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BEFORE THE FEDERAL ELECTION COMMISSION

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MUR 6888

**RESPONSE OF FREEDOM PARTNERS ACTION FUND TO THE
SECOND SUPPLEMENTAL COMPLAINT**

By and through undersigned counsel, Freedom Partners Action Fund ("FPAF") hereby responds to the Complaint in the above-captioned Matter Under Review ("MUR"). FPAF appears to have been added to this MUR as part of Complainant's Second Supplemental Complaint in this matter. No evidence asserted in any of the three complaints (collectively referred to as the "Complaint") points to FPAF having violated the Federal Election Campaign Act of 1971, as amended (the "Act") or the Commission's regulations implementing same. In addition, the Complaint misstates both the law and the facts, and accordingly, we respectfully request this matter be dismissed and the file closed.

FACTUAL AND LEGAL ANALYSIS

FPAF is a registered independent expenditure-only political committee (a so-called "Super PAC"). FPAF's public filings with the Federal Election Commission reveal its independent expenditure activities and that, in the 2014 election cycle, it used i360 as a vendor to provide media buying and related services. FPAF is not a subscriber or client of the individual non-media products of i360 that appear to be at the center of the Complaint, *i.e.* what the Complaint calls "voter lists." FPAF's understanding is that i360 media buying and related services are provided by individuals operating separately from the individualized data services

offered by i360. To the best of FPAF's knowledge and belief, i360 does not provide media buying or related services to any candidates or political parties.

The Complaint alleges a massive "scheme" involving the alleged sharing of data between campaigns and outside groups, resulting in alleged coordinated communications. As applied to FPAF activities, though, it is entirely unclear how such data sharing could result in coordinated communications by FPAF. For a communication to be coordinated, it must satisfy three standards: it must be paid for by a third party, it must satisfy one of the "content" standards, and it must meet at least one of the "conduct" standards. *See* 11 C.F.R. § 109.21(a); 68 Fed. Reg. at 430. This test is not met here.

1. **The Complaint is deficient and should be dismissed because it fails to identify any communications alleged to be coordinated or that meet the payment or content prongs of the coordination analysis.**

The Complaint fails to identify with particularity any public communication alleged to be coordinated or which candidate or candidates with which such unknown communication was allegedly coordinated. Instead, the Complaint merely alleges a grand conspiracy, apparently among anyone showing a disbursement to i360 as a vendor. FPAF is an active Super PAC that has made a number of independent expenditures, and cannot be expected to answer wildly while blindfolded at vague allegations of a "scheme," the only details about which have nothing to do with the types of services FPAF purchased from i360. The regulatory text demands more than generalized accusations of "coordination," and instead treats the coordination analysis as one that turns on a specific communication. *See* 11 C.F.R. § 109.21(a) ("A communication is coordinated when . . .") (emphasis added).

Without such information, the Complaint is a "mere conclusory allegation" which the Commission has recognized "does not shift the burden of proof to the respondents." MUR 4850

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(Deloitte & Touche, LLP), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2. Without such information, there can be no reason to believe that FPAF coordinated communications since there is no information that the content or payment prongs were met. *See* 68 Fed. Reg. at 430 ("the content standard may be viewed as a 'filter' or a 'threshold' that screens out certain communications from even being subjected to analysis under the conduct standards"). And without such information, there is not sufficient notice or opportunity for FPAF to respond or rebut any allegations to meet the minimum requirements of due process.

2. **The Complaint does not allege and offers no evidence that i360 is a common vendor between FPAF and any campaign or candidate about which FPAF has made public communications, and makes no allegations that any other conduct prong was met.**

In addition to the fact that the Complaint fails to identify any communication that was allegedly coordinated, the Complaint does not allege and does not offer any supporting evidence that the conduct prong has been met with regard to any FPAF communications. The only conduct standard at issue here appears to be section 109.21(d)(4), where the Complaint states that the respondents were involved in what Complainants describe as a "near-textbook violation" of the common vendor rule. There are two fatal flaws with the Complaint's allegations here, though. First, the Complaint seriously misstates the common vendor rule, and second, to the best of FPAF's knowledge and belief, i360 was not a common vendor with any of the candidates about which it made communications.

First, the Complaint badly mangles the common vendor rule. While it goes on about a "common vendor" "scheme," the Complaint's actual theory seems to be that the mere existence of the use of one vendor to provide services to both candidates and independent speakers, without more and regardless of what those services entail, yields coordination. This flips the

standard and presumption of the regulation and accompanying explanation and justification on its head:

But under this final rule, even those vendors who provide one or more of the specified services are not in any way prohibited from providing services to both candidates or political party committees and third-party spenders. This regulation focuses on the sharing of information about plans, projects, activities, or needs of a candidate or political party through a common vendor to a spender who pays for a communication that could not then be considered to be made "totally independent" from the candidate or political party committee.

2003 E&J at 436-37. Clearly, "coordination" takes much, much more than has been offered by the Complaint.

The Complaint does not allege and does not proffer any supporting evidence that i360 was actually a common vendor with regard to the media buying services rendered to FPAF. While the Complaint dwells on allegations regarding data sharing and does mention that i360 provides media buying services, it does not allege that i360 provides media buying services to both campaigns and independent speakers or that FPAF used i360 as a vendor of individualized data. FPAF did not purchase such services from i360 and, to the best of FPAF's knowledge and belief, i360 does not provide media buying services to campaigns (and the Complaint does not include any allegation along those lines). Accordingly, i360 is not a common vendor between FPAF and campaigns about which FPAF may make communications.

Even assuming *arguendo* that i360 is a vendor in common to FPAF and campaign clients about which FPAF has made public communications, much more is needed: the sharing or using of a campaign's plans, projects, activities, or needs with an independent speaker, which are material to the creation, production, or distribution of that independent speaker's communication. But here, the Complaint offers no evidence whatsoever or even a suggestion that any such information was shared or used in FPAF's communications. Nor could there be, as such

information was neither shared nor used. Again, even assuming *arguendo* i360 was somehow a common vendor (despite the fact that it did not provide media buying services to any campaign), there is no allegation or information suggesting that any information was shared or used through i360 about a campaign's plans, projects, activities, or needs material to the creation, production, or distribution of an FPAF communication. Indeed, FPAF has no knowledge of any information developed by i360 for any campaign nor does FPAF have any knowledge of any information shared by any campaign with i360, if any.

Finally, it is the understanding of FPAF that the i360 media buying services are provided by employees who, pursuant to a firewall, are separate from the i360 individualized predictive data operation. Thus, those employees do not interact with campaigns. See MUR 5506 (EMILY's List) (Recognizing committee's assertion of a policy barring employees from sharing information about candidates with the independent expenditure side of the committee). There has been no assertion that casts doubt on the existence or effectiveness of this arrangement and no indication of any information purported to have been shared with FPAF as a media buying client of i360. See *id.* at 7. Thus, the Complaint fails to allege a violation of the Act or Commission regulations and should be dismissed. See Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 2 ("Unwarranted legal conclusions from asserted facts . . . will not be accepted as true.").

CONCLUSION

In sum, the Complaint should be dismissed against FPAF because it fails to make any sufficient allegations that FPAF made coordinated communications as a result of using i360 as a media buying vendor. It fails to allege any facts or circumstances that would give rise to such coordination—it fails to identify any specific communications that were allegedly coordinated, it

fails to allege that FPAF used a vendor in common with campaigns about which it independently spoke, and it fails to allege that FPAF received or used any campaign information material to its communications. For the foregoing reasons, FPAF respectfully requests that the Commission find no reason to believe that a violation occurred, that this matter be dismissed, and that the Commission close the file.

Respectfully submitted,



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